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In the

Supreme Court of the United States

RENEE NEAVES, et al.,

Petitioners,

v.

CITY OF SAN DIEGO, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Defendants/Respondents City of San Diego, former Chief of Police Jerry Sanders, and six San Diego police officers submit this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Plaintiffs/Petitioners Renee Neaves and David Neaves (Case No. 02-55512).

Petitioners assert that the Court should review the decision in this matter because the District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit were incorrect when they held that Petitioners failed to demonstrate that Respondents' alleged conduct (1) denied Petitioners access to the state courts, and (2) violated Petitioners' right to equal protection of the laws.

Petitioners' claims fail on the merits, and rely in part, on a misstatement of the record.

STATEMENT OF THE CASE

The record shows that on March 29, 1996, Petitioners' three-year-old boy collapsed, and went into a coma, while under the care of his daytime babysitter. The child died three days later. The day after the child's death, the San Diego County Medical Examiner's Office performed an autopsy and concluded that the cause of death was bronchopneumonia due to subdural hematoma and massive brain swelling. However, the Medical Examiner's Office was unable to determine the manner of death. There is nothing in the record indicating who, if anyone, was responsible for the death of the child.

Contrary to the assertion in Petitioners' Petition, there is absolutely no evidence in the record that Petitioners' son died "at the hand of his babysitter."

The record shows that Petitioners' child had sustained three separate head injuries within a two and one-half to three-week period prior to his death. The injuries had occurred both at the child's home and at the babysitter's house. On the morning of the day when the child collapsed at the babysitter's house and before the child was taken to the babysitter by his mother, Renee Neaves, the child complained of having a headache. The record reflects that in response to that complaint, that morning, the mother took her boy to an outpatient medical clinic for examination. The record also reflects that shortly before the child collapsed in the babysitter's home, he complained of a headache and that he was tired.

Although the County Medical Examiner was unable to determine the manner of death, the record shows that an extensive investigation of the child's death was immediately undertaken by the San Diego Police Department and the County of San Diego. At the hospital where the child had been taken, the babysitter was questioned by the medical staff and by a hospital social worker. She was also questioned by a County of San Diego social worker and by a City child abuse detective. A woman, who had taken her child to the babysitter's home and who had been in the home within eleven minutes prior to the collapse of Petitioners' child, and the oldest child who was in the home at the time of the incident were also questioned by the City child abuse detective.

The investigators believed that the babysitter was truthful when she told them that she had not shaken the child or mistreated him in any way. They believed that she was telling the truth when she told them that Petitioners' child suddenly collapsed shortly after being brought to the house by his mother.

Respondent Paul Redden who had been employed by the City of San Diego Police Department as an interview and interrogation specialist since 1985 administered a polygraph examination of the babysitter regarding the death of Petitioners' son. The examination was video and audio taped. Mr. Redden did not know the babysitter's father, who happened to be a police sergeant. It was Mr. Redden's expert opinion that the babysitter did not attempt deception, when during the polygraph examination, she denied shaking or physically abusing the child.

At one point during the administration of the polygraph, the babysitter vomited. Mr. Redden did not believe that vomiting during the examination would affect the results of the examination. Petitioners hired a polygraph expert who entertained a different opinion. A polygraph expert retained by the City of San Diego stated that vomiting during a polygraph examination, although unusual, does not reflect a consciousness of guilt. It is only an indication of nervousness that is not unusual for people taking a polygraph examination. The City's expert did state that there should have been a longer period of time between -- when the babysitter vomited -- and when the test resumed, as the physical reactions tested by the polygraph immediately after the vomiting could be skewed. Nevertheless, the City's expert testified that the errors he found would not have caused a

consciousness of guilt to be covered up, only that the results of the examination could be inconclusive.

Approximately nine months after the autopsy was performed, the Medical Examiner's Office unexpectedly filed an Amended Autopsy Report in which the cause of death was found to be "subdural hematoma, diffuse axonal injury and massive brain swelling." The manner of death was listed as "Homicide," but the report did not identify the person who might have been responsible for the death.

Due to the findings contained in the Amended Autopsy Report, Homicide detectives reinterviewed the child's mother and the babysitter. They also interviewed a person who had stayed at the babysitter's house prior to the date Petitioners' child collapsed, and a friend of the boy's mother who had been at the babysitter's home on several earlier occasions. The record reflects that the reason for the additional investigation was the filing of the Amended Autopsy Report by the County Medical Examiner's Office, not "pressure from the Neaves and other concerned citizens" as asserted in Petitioners' Petition.

The record does not show who, if anyone, was responsible for the death of Petitioners' child. The record shows that the San Diego County District Attorney's Office evaluated the case and retained at least two physicians who were specialists in the field of "shaken baby" injuries to review the matter. However, according to the District Attorney's Office, the medical doctors were unable to agree on the manner of death and no criminal chargers were filed against anyone.

Petitioners filed a wrongful death action against the babysitter in state court, but were unable to pursue that action due to an order issued by the United States Bankruptcy Court, Southern District of California, permanently enjoining the prosecution of that action.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit Correctly Held that Petitioners Failed to Demonstrate that Respondents' Alleged Conduct Denied Them Access to the State Courts

Petitioners contend that the Ninth Circuit misinterpreted *Christopher v. Harbury*, 536 U.S. 403 (2002), when it held that Petitioners failed to show that Respondents' alleged conduct denied Petitioners access to the state courts.

Petitioners, not the Ninth Circuit, have misinterpreted *Christopher*. In *Christopher*, there was no issue of whether the alleged misconduct of the defendant government officials denied plaintiff access to the courts. Rather, the issue was whether plaintiff had identified, or could identify, an underlying cause of action for relief that she could have brought but for the deceptions alleged. The Court in *Christopher* held that plaintiff could not state a claim for denial of access to the courts because she failed to identify, nor could she identify, the underlying cause of action.

Here, Petitioners have identified an underlying cause of action, to wit, a wrongful death action against the babysitter. However, Petitioners did not, and cannot

satisfy the requirement that Respondents' alleged conduct denied Petitioners access to the courts. In this case, there was one single reason why Petitioners were unable to prosecute their wrongful death claim against the babysitter in state court -- it was the Order of the United States Bankruptcy Court, Southern District of California -- that permanently enjoined the prosecution of the case. No action or inaction by Respondents prevented Petitioners from prosecuting the wrongful death action. Perhaps the District Court stated it best when it concluded that "the doors of the state courts were closed by the bankruptcy court, not the [Respondents]."

Nevertheless, for the first time, Petitioners argue that Respondents' alleged misconduct was a concurring cause of Petitioners' inability to prosecute the wrongful death action in state court. Petitioners made a similar argument before the Ninth Circuit, contending that under *Christopher*, conduct by a defendant which is intended to destroy or cover up evidence of a crime for the purpose of hindering a person's ability to pursue judicial remedies, standing alone, violates that person's constitutional right of access to the courts, regardless whether such conduct rendered the state action ineffective.

The Ninth Circuit, however, correctly concluded that *Christopher v. Harbury*, 536 U.S. 403 (2002), did not change the law in a denial of access to courts claim that plaintiff must demonstrate that defendant's alleged misconduct rendered plaintiff's state court action ineffective. The Ninth Circuit properly determined that Petitioners failed to demonstrate that Respondents' alleged conduct prevented them from prosecuting the wrongful death action.

Since the Ninth Circuit holding is not in conflict with governing Supreme Court precedent, the Petition for a Writ of Certiorari should be denied.

II. The Ninth Circuit Correctly Held that Petitioners Failed to Show that Respondents' Alleged Conduct Violated Petitioners' Right to Equal Protection of the Laws

Petitioners contend that the Ninth Circuit misinterpreted *Willowbrook v. Olech*, 528 U.S. 562 (2000), when it upheld the District Court's finding that Respondents' alleged failure to properly investigate the death of Petitioners' son did not deprive Petitioners of equal protection of the laws.

Petitioners, not the Ninth Circuit, have misinterpreted *Willowbrook*. In *Willowbrook*, plaintiff alleged that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply, whereas the Village only required a 15-foot easement from other similarly situated property owners. She sued the Village for violating her equal protection rights, contending that the 33-foot easement demand was "irrational and wholly arbitrary"; that the Village's demand was actually motivated by ill will resulting from the previous filing of an unrelated, successful lawsuit against the Village; and that the Village acted either with the intent to deprive her of her rights, or in reckless disregard of her rights.

The District Court dismissed the lawsuit for failure to state a cognizable claim under the Equal Protection Clause. The Court of Appeals for the Seventh Circuit

reversed, holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." The Supreme Court granted certiorari "to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The Court held that equal protection claims may be brought by a "class of one," provided plaintiff alleges that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. at 564. In allowing such a claim, the Court emphasized that the purpose of the equal protection clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Id.* at 564, quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923).

In *Village of Willowbrook*, the Court held that the allegations in the complaint that the Village engaged in intentional discrimination that was irrational were sufficient to state a claim for violation of equal protection "quite apart from the Village's subjective motivation." *Village of Willowbrook v. Olech*, 528 U.S. at 565. The Supreme Court stated that it did not reach the alternative theory of "subjective ill will" relied on by the Court of Appeals. Thus, whether plaintiff is a member of a protected group or is a class of one, liability for a violation of equal protection requires proof of discriminatory intent. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564

(2000); *see also Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

In the instant case, Respondents have never asserted that a plaintiff must allege subjective spitefulness, animus, or ill will by a defendant before a claim of violation of equal protection can be stated, and the Ninth Circuit did not impose such a requirement in this case. Rather, the Ninth Circuit correctly held in accordance with *Willowbrook*, and all other equal protection cases decided by the Court, that a plaintiff must demonstrate that he has been intentionally treated differently from others similarly situated, and that there is no rational basis for the difference in treatment.

The Ninth Circuit correctly applied existing law when it upheld the order of the District Court granting summary judgment to Respondents with respect to the equal protection claim. For that reason, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth above, Defendants/Respondents respectfully request that the Petition for a Writ of Certiorari filed by Plaintiffs/Petitioners be denied.

Respectfully submitted,

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